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ABSTRACT

Part of a series of classroom aids designed for real estate instructors, this instructional packet was developed to help real estate students understand the different types of wills recognized in Texas, their preparation, provisions, and execution. First, information about wills is presented, including definitions of relevant terms and a description of the types of wills recognized in Texas: (1) formally executed wills (i.e., wills in writing, signed by the testator, and witnessed and signed by two or more credible witnesses); (2) holographic wills (i.e., wills written and signed in the testator's handwriting); (3) noncupative wills (i.e., oral wills that can be used to dispose of personal property); and (4) shared or common wills (i.e., wills which can operate for two or more persons). The next sections consider various will provisions, including the preamble, revocation of prior wills and codicils, payment of debts and expenses, bequest of assets, appointment of an executor, independent administration, simulataneous death provisions, providing for the case of minors and incompetents, and self-proving affidavit. Finally, the packet presents a series of 28 overhead masters keyed to the text. (EJV)

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TEACHERS INSTRUCTIONAL PACKET
TIP No. 14, Spring 1987

TEXAS WILLS

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This packet is designed to help real estate instructors communicate with students studying real estate. The contents and materials may be modified as the instructor deems appropriate. Reproduction of materials for student use is encouraged.

TIPS on the TIP

This Teacher Instructional Packet (TIP) is designed to provide the real estate instructor with a classroom supplement. Packets have been reviewed carefully, but there is always room for improvement. Suggestions to improve the usefulness of the TIP are welcomed.

Introduction to TIP-14

TIP-14 has been developed to provide students with information concerning property transfer from generation to generation. This material is provided as a **supplement** to existing course content. It is not a "pat" presentation. The instructor may use as much or as little as needed.

Note: Copies of the Center technical report, Texas Wills are available to Texas real estate instructors for one-half of the listed price of $5 each. Out-of-state orders are $10. Request publication number 449. Instructors have permission to reproduce this report in full or in part providing no changes are made in the content.

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Almost every expert in the field of estate planning agrees that a carefully prepared and drafted will is the heart of a successful estate plan. But until now, most of the available literature on estate planning was geared to the large estate and had as the primary objectives the lowering or possibly the avoiding of federal gift and estate taxes and state inheritance taxes. This publication addresses the different types of wills recognized in Texas--their preparation, provisions and execution. It also includes the legal process of making changes to wills and the legal process by which wills are probated. Grounds for contesting a will and the examination of will substitutes are included as well.

An obvious question is: Why has the Texas Real Estate Research Center (TRERC) published this material? The answer lies in the fact that real estate frequently is the bulk of any estate--large or small. The proper transfer of real estate from generation to generation not only is in the best interests of the individuals concerned, it is important to the overall well-being of the Texas real estate industry.

This publication is limited to the small estate--one that will not incur any federal gift and estate taxes nor any Texas inheritance taxes. Estates not exceeding $325,000 in 1984, $400,000 in 1985, $500,000 in 1986, and $600,000 in 1987 and in years thereafter fit this description.

Visual #1
Small Non-Taxable Estates

An attempt has been made to use familiar terms; however, a glossary of terms has been included.

Before examining the various types of wills, synopses are made of what constitutes a will, of some definitions of relevant terms used in association

with wills and will preparation and of the capacity of someone to execute a will in Texas.

A will is a written document or an oral expression describing legally how a person's assets are to be distributed at death. The person making the will is called a testator if the maker is a man or a testatrix if the maker is a woman. (In this publication the term testator refers to both genders.) A person dying with a will is said to have died testate. A person dying without a will is said to have died intestate.

Visual #2
What is a Will?

If a person dies intestate, Texas has laws determining how the deceased's assets will be distributed. The person or persons, including the surviving spouse, who are entitled to receive assets from a person dying intestate are called the heir or heirs. Heirs are determined by state law according to a process known as descent and distribution. The Texas laws of descent and distribution are described in Section A of the Appendix. Heirs should not be confused with descendants. A testator's descendants include only individuals descending directly from the body of the testator, such as children and grandchildren. In Texas, adopted children are viewed as descendants. Descendants do not include the testator's brothers, sisters, aunts, uncles, parents or grandparents.

If the testator disposes of land (or real property) through the will, the dispensation is called a devise. The person or persons receiving the land are called devisees. If the testator disposes of personal property through the will, the dispensation is called a bequeath, bequest or a legacy. The person or persons receiving the personal property are called legatees. (As used in this publication and according to the Texas Probate Code [TPC], the term "devise" includes transfers of both personal and real property. This

Visual #3
Testator and Beneficiaries

publication uses the terms devise and bequest interchangeably and refers to the transfer of any property by will.)

A person qualified to make any type of valid will in Texas must be more than 17 years of age and of "sound mind." Sound mind means the person understands the nature and effect of the will and the type and extent of his or her property ownership. The term also means the person knows how and to whom the property is being distributed. Persons less than age 18, who are of sound mind may make a valid will if they are married or are members of the armed forces of the United States.

Visual #4
Testator's Qualifications

Types of Wills Recognized in Texas

There are three basic types of wills recognized by Texas law. Some wills are unique and limited to specific purposes. This publication describes each type, its uses and limitations.

Visual #5
Types of Wills

Formally Executed Will

A formally drafted and executed will is one in writing (generally typewritten) and signed by the testator or by someone on behalf of the testator in the testator's presence. If the will is not totally in the testator's handwriting, which is generally the case with a formal will, it also must be attested (or witnessed) by two or more credible persons more than the age of 14 and subscribed (or signed) by the two witnesses in the testator's presence.

Presence means conscious presence such that the person actually sees or can readily see, by exerting some slight physical effort, another sign the document.

Attesting means the act of witnessing the valid execution of a will. A will is attested in Texas by the witnesses subscribing their names to the instrument in the presence of the

testator. Subscribing means signing one's name at the end of the printed or written document. However, Texas law has held that the location of the witnesses' signatures does not effect the validity of a will.

The purpose of requiring two or more credible witnesses is to guard against undue influence being placed on the testator and to prevent the fraudulent substitution of another instrument. In Texas, the testator is not required to sign the will in the presence of the witnesses. Neither are the witnesses required to sign in the presence of each other. But, the witnesses must sign in the presence of the testator. It is recommended all parties sign in each other's presence.

A credible witness is someone more than age 14 who is competent to testify in court to the fact of the execution of the will. A witness cannot be credible if he or she receives any benefits under the will. If a witness is a beneficiary of the will, Texas law requires a forfeiture of the devise unless the will can be proven otherwise. If a forfeiture occurs, the witness still can receive a portion of the estate equal to the amount he or she would have received had the testator died intestate. However, the value of the property so taken cannot exceed the amount originally given the witness in the will.

Holographic Will

A holographic will is a handwritten will. It is entirely written and signed in the testator's handwriting. No date nor witnesses are required by Texas law. Holographic wills are used whenever the testator wishes the bequest to be kept strictly confidential or where there is no time or opportunity to prepare a formally executed will. A holographic will was scratched on the fender of an overturned tractor after the driver was

fatally pinned underneath it. Holographic wills have even been scrolled on nurses' garments prior to a patient's imminent death. Texas is one of the few states that recognizes holographic wills.

Nuncupative Will

A nuncupative will is an oral will. In Texas nuncupative wills only can dispose of personal property. For an oral will to be valid, it must have been declared during the testator's last illness and proclaimed at the testator's home or where the testator had resided for 10 days or more preceding the date of the will. (Note: The 10-days-away-from-home stipulation is waived if the testator is taken from the home and dies without returning.) Additionally, the proclamation must be made in the presence of three credible witnesses whom the testator specifically asked to be witnesses. However, the three credible witnesses are necessary only if the value of the personal property exceeds $30.

Section 86 of the TPC adds further requirements as to the proof of a nuncupative will.

No nuncupative will can be proven within 14 days after the testator's death or before those who would have taken by descent and distribution have been summoned to contest the will if they so desire.

If the three credible witnesses are not asked to testify within six months after the oral will is proclaimed, their testimony is barred from court unless terms of the will were committed to writing within six days after the oral will was made.

Oral wills by their nature are subject to error and mistake. For this reason, only personal property can be transferred; and three, not two, witnesses are required.

Shared or Common Wills

Texas law recognizes instances where one written document can operate as the will for two or more persons or where two or more written wills can be tied together inextricably. Such arrangements include joint wills, mutual wills, reciprocal wills and joint-and-mutual wills. Spouses typically execute wills of this nature where they have had families by prior marriages and want to ensure that certain assets go to the prior offspring.

The problem with these wills is determining their revocability either prior to the death of any testator or after the death of one or more testators. If a contract has been entered by the testators making the will irrevocable, the courts have attempted to enforce the contract if (1) a testator has died, (2) the will has been probated and (3) a surviving testator has received property under the terms of the probated will. Many of the controversies, however, have focused on the existence of a contract and its terms and provisions .

The controversies resulted ultimately in legislation in 1979 that added Section 59A to the TPC. Section 59A holds that the execution of a joint will or reciprocal wills does not of itself suffice as evidence of a contract. Furthermore, a contract to make a will or devise, or not to revoke a will or devise, if entered by testators after September 1, 1979, can be established only by the will stating that a contract exists and reciting the material provisions of the contract.

Section 59A establishes a presumption against the irrevocability of joint and reciprocal wills. The statute does not address explicitly mutual wills. However, competent counsel should be employed concerning

the creation of any of these types of wills.

Will Provisions

Visual #6
Provisions

All wills have several basic provisions. A properly prepared and constructed will contains many, if not all, of the provisions that will be discussed. (Section B of the appendix has the approximate order in which the clauses appear in a will.)

Preamble

There is no prescribed language required at the beginning of a will. Generally, the heading states "The last will and testament of..." Some individuals also prefer a reference to God by inserting "in the name of God, amen," or "in the year of our Lord____, A.D." From a legal standpoint, such references are not necessary. The references generally reflect the solemnity of the occasion.

The opening paragraph generally recites the testator's full name, any other name the testator may go by and the county of his or her present residence. The opening paragraph also may recite the testator's testamentary qualifications such as, "Being above the age of 17 and of sound mind and body." Reciting the latter qualifications does not necessarily make them true. The soundness of the body is irrelevant as to the legal capacity to make a will.

Revocation of Prior Wills and Codicils

Each will should state explicitly the revocation of all prior wills and codicils executed by the testator if this is the intent. (A codicil is an instrument executed subsequent to a will that amends or modifies the will.) Where a testator executes two wills, without the latter revoking the former, both wills will be admitted to probate and construed together to the extent

possible. Revocation of a will by implication is not favored in Texas.

Visual #7
Payment of Debts

Payment of Debts and Expenses

Each will generally states that the testator's just debts are to be paid as soon as practical following the testator's demise. Such a provision is of little legal consequence because Texas law charges the debts and expenses to the estate regardless of what the will provides.

Sections 320, 320A and 322 of the TPC specify how the claims against the estate are classified and the order in which they are retired. As a practical matter, these statutes are called into play only where the estate is inadequate to retire all claims. A synopsis of these laws is contained in Section C of the appendix.

A testator who desires to have a debt-retirement clause should describe explicitly how the debts and expenses are to be handled. Here are some alternatives.

* For long-term debts, such as those against real estate, require the executor to pay the debts only as the installments come due. Also, allow the executor to extend or renew any debt for such terms as the executor deems best.

* If the surviving spouse is to receive the primary residence, the testator may want any existing mortgage retired, if sufficient assets exist in the estate. Otherwise, the testator may want to carry some form of insurance to pay off such debts.

* Specify which, if any, assets are to pass debt free and which are to be used first to satisfy debts and expenses. Alternatively, provide that all assets are to be proportionately reduced to retire the debts and expenses with certain possible exceptions.

Unless the testator states otherwise, Texas law prescribes the following order in which the assets will be taken to satisfy the debts of the estate.

Visual #8
Order Assets Taken to Satisfy Debts

1) The assets-passing under the residuary clause of the will are taken first. Personal property is to be taken before real property.

2) The assets passing under a general devise are taken next. Again, the personal property is taken before the real property.

3) Finally, the assets passing under specific devises of the will are taken. As before, specific devises of personal property are taken before the real property.

For those who may not be familiar with the references, here is a synopsis of these terms.

Visual #9
Types of Devises

The residuary clause disposes of property not otherwise devised in the will. If the testator does not have a residuary clause, undisposed assets pass under the laws of descent and distribution as described in Section A of the appendix.

A general devise or bequeath denotes a disposition under the will of property of a general nature or character that may or may not exist when the will is executed or even when the testator dies. For instance, if a testator gives all his or her real property to a daughter, this is a general devise.

A specific devise is a gift of a specific part of the testator's estate. The devise describes particular assets the testator owns. A gift of the testator's 250-acre farm in Harris County, Texas, is a specific devise.

Specific devises are subject to a concept known as ademption. Ademption is the indirect (or implicit) withdrawal or cancellation of the devise. It occurs where specifically devised assets are missing from the testator's estate at death. The following example describes such a situation.

Visual #10
Ademption

In 1978 a testator owns 250 acres of land in Harris County, Texas. He executes a will that contains a legal description of the acreage. The property is devised to the testator's daughter. In 1980 the testator sells the land to a third party. In 1984 the testator dies. In this example, the gift to the daughter would have been adeemed or cancelled. The testator withdrew the specific devise by selling the land prior to his death. The daughter would get none of the land.

Testators also should be familiar with a concept called abatement. Abatement is the process of determining the distribution among the various beneficiaries named in the will when the assets are insufficient to pay the testator's debts and expenses of administration and still satisfy all the bequests. Abatement determines which bequests are satisfied first and which are nullified.

Visual #11
Abatement

Abatement, as applied in Texas, requires specific devises to be satisfied first, general devises next and the residuary bequests last. Abatement may necessitate the selling of residual assets to satisfy specific bequests. For example, suppose a testator executes a will in 1978. Times are prosperous for the testator. He bequeaths $50,000 to his favorite charity. The residue of his estate, including a small farm, are left to his wife and children. The testator undergoes a financial crisis after executing the will. When he dies, the only asset remaining is the small farm. It is worth $75,000.

This is a classic example of abatement. The farm (a residuary devise) must be sold to satisfy the specific devise of $50,000 to the charity. The wife and children will get the remainder after satisfying the testator's debts and costs of administering the estate. Probably this was not the testator's intent when the will was executed.

When the funding for a specific bequest of money is not specified, as here, this may even cloud the title to the small farm until the charity is paid.

A different outcome would have resulted if the bequest had stated that the $50,000 was to be taken from the money in the XYZ bank account. In this case, if the XYZ bank account did not exist, or if it did not contain $50,000 at death, the bequest would be adeemed, and the farm would not necessarily have to be sold.

Testators sometimes make specific devises in satisfaction of an existing debt. For instance, the testator may give a creditor property equal to or greater than the amount of a debt owed. In such instances, the testator should state explicitly that the devise is made in lieu of and in satisfaction of the debt. Otherwise, the debt may be satisfied twice--once by the devise and again by the estate.

Bequest of Assets

The <u>focal point of every will is the dispensation of the testator's assets</u>. The particular scheme or plan should be clearly and plainly spelled out. Although no particular words or phrases are required, the <u>intent</u> of the testator <u>should be without question</u>. With minor exceptions, the <u>assets</u> which can be disposed of by the will <u>include all the testator's separate property</u> and <u>one-half the community property</u>.

Visual #12
Guidelines to Consider When Disposing of Assets

The following are some relevant guidelines to consider when disposing of the assets.

1) Use mandatory words such as give, bequeath or devise and not precatory words such as want, wish or desire. There is a great deal of legal difference between saying, "I desire and want my son John Doe to have..." versus "I hereby give and devise to my son John Doe..."

2) State the full name and kinship of close relatives. Do not state the kinship without following it with the full name. For instance, avoid saying my son, my wife or my daughter. The testator eventually may have more than one son, daughter or wife.

3) Dispose of all assets at least to the first alternative and possibly to the second. For instance, if a bequest is made to the spouse, follow it by stating, "But in the event my spouse, (name), should predecease me, I give the assets to...."

4) Fulfill promises of specific bequests in the will. For instance, the testator may have promised a particular family heirloom to a certain member of the family. Or, the testator may have promised a gun, boat or automobile to a close friend. If the promise is not fulfilled, litigation and hard feelings may develop.

5) Place a residuary clause in the will. The residuary clause disposes of (1) property whose devise lapses for whatever reason, (2) property acquired after the will's execution and not otherwise disposed of in the will and (3) property that was simply overlooked by the testator. Without a residuary clause, the undisposed assets are distributed according to the rules of descent and distribution.

6) State how assets going to a certain group of individuals are to be distributed. The assets may go per stirpes, per capita or only to the survivors of the group.

Visual #13
Per Stirpes vs.
Per Capita
Distribution

Per stirpes means persons of the described group share equally. Descendants of predeceased members of the designated group share equally in the portion that would have gone to their predecessor. Per capita means all members in the class share equally regardless of degree of kinship to the testator.

Take the following example. Suppose T (testator) has four children--A, B, C and D. A has two children and B has three. Suppose T leaves all his assets to his children to share per stirpes. If all four children survive T, each will receive one-fourth the estate. If B predeceases T, then A, C and D will each receive one-fourth, and B's three children will each receive one-twelfth.

Suppose T had left all his assets to his descendants to share per capita at his death. If all four children survive T, the children and grandchildren would each receive one-ninth of the estate. If B predeceases T, each descendant will receive one-eighth of the estate.

However, had T left all his estate to his children "living at the time of his death," each child would have received one-fourth of the estate if they survived T. If any child predeceases T, the remaining three would receive a one-third regardless of whether the predeceased child was survived by descendants of his or her own.

Whether the distribution in a particular case is per stirpes or per capita depends on the testator's intentions. If the intention is

ambiguous or unclear, it will be presumed that the testator intended the property to pass according to the laws of descent and distribution. This means the distribution would be made per stirpes.

One problem with per stirpes and per capita distributions is that the surviving spouse of a deceased member of the group is bypassed. This may or may not be the testator's intentions. If it is not, the will should make specific provisions for the surviving spouse.

7) Detail whether the persons receiving the property as a group have the right of survivorship. A right of survivorship means that the property goes to the group member who lives the longest. Whenever a group member dies, his or her property interest goes immediately to the remaining group members until only one is left.

There is no right of survivorship in property taken as "tenants in common". There is right of survivorship in property taken as "joint tenants with the right of survivorship".

In Texas, unless the testator explicitly states otherwise, any property left to a group is taken as tenants in common with no right of survivorship.

8) Beware of the forced heirship laws as they apply in Texas. Some states have general forced heirship statutes. Such laws prevent a child, or other heirs of the testator, from being effectively cut from the estate by being omitted from the will. Where such statutes exist, a testator's failure to mention each heir in the will allows the unmentioned heirs to "force" from the deceased's estate a portion equal to what they would have received had the testator died intestate. To guard against such an event, testators typically leave each of their heirs, by name, at least $1 in the will.

Visual #14
Limited Forced
Heirship Statute
Section 67(a) TPC

Texas does not have general forced heirship statutes, but it does have two statutes that apply in limited situations. The purpose of these statutes is to guard against thoughtlessness or forgetfulness of parents who fail to change their wills after the birth or adoption of a child.

The first statute, Section 67 (a) of the TPC, takes effect when the following events transpire:

* the testator has children when the will is executed,

* the surviving spouse is the father or mother of all the testator's children (exclusive of adopted ones),

* the testator's children receive no benefits under the will and the surviving spouse is not the principal beneficiary,

* there are children either born or adopted after the will's execution, and

* the estate of the deceased does not reach voluntarily a settlement with the omitted children for their share of the estate.

If these conditions occur, the children born or adopted after the will's execution can force an intestate's share from the estate. All beneficiaries of the will must contribute proportionately to satisfy the intestate share.

Visual #15
Limited Forced
Heirship Statute
Section 67(b) TPC

The second statute, Section 67 (b) of the TPC, takes effect when the following conditions elapse:

* the testator has no children when the will is executed,

* the surviving spouse is the father or mother of all the testator's children (exclusive of adopted ones),

* the testator's children receive no benefits under the will and the surviving spouse is not the principal beneficiary, and

* there are children either born or adopted after the will who are not provided for nor mentioned in the will.

If these conditions transpire, the will is to be placed in suspense for one year following the testator's death. If the after-born or after-adopted children die during the one-year period, the will is given full force and effect. However, if they survive the period, the will is voided, and the assets pass by descent and distribution.

To guard against the consequences of these statutes, the testator may wish to pursue these alternatives:

Visual #16
Alternatives to
Statutes 67(a) & (b)
TPC

* revise the will or execute a codicil after the birth or adoption of each child,

* insert special provisions for children born or adopted after the will's execution, or

* direct the executor to make settlements for any children born or adopted after the will's execution pursuant to Section 67 (a).

9) Be aware of the Texas anti-lapse statute when making bequests. Texas law provides that any devise to a child or other descendant of the testator shall not lapse simply because the child or descendant predeceases the testator. Instead the children or other descendants of the predeceased, if any, share per stirpes in the testator's estate. However, this anti-lapse statute applies only where the devise is made to a descendant of the testator and only where the will does not provide for an alternate bequest.

10) When the gift to the minor involves real property, which is the separate property of the testator, the testator may wish to invoke Section 70 of the TPC. This section allows the surviving spouse to manage any separate property (as opposed to community property) for the benefit of the children until they reach a lawful age. The section applies only where stated in the will.

Appointment of an Executor

The selection and appointment of an executor is one of the most important provisions in a will. The decision should not be taken lightly. To consider it an honor or privilege to be appointed an executor is a misconception. The selection should be made after matching the executor's role with the potential executor's qualifications.

Visual #17
Executor

An executor is a man appointed in the will to carry out the will's directions and to dispose of the testator's property accordingly. An executrix is a woman serving the same role. (In this book executor refers to both genders.)

Visual #18
Executor's Duties

The general duties of any executor include the collection and preservation of the estate's assets, the payment of the estate's debts and the distribution of the residue to the distributees. Specific duties of any executor include the probating and recording of the will; the filing of a bond (unless waived) and the taking of an oath; the return of an inventory, its appraisal and list of claims; setting apart homestead properties; fixing the family allowance, presentation, classification and payment of claims; sales of estate properties; hiring, renting or leasing estate properties; partition and distribution of estate properties; investment activities; lending and borrowing; and accountings and final settlements.

Generally, all these duties must be performed under court supervision.

The executor also is charged with the responsibility of filing all necessary and appropriate tax forms with the Internal Revenue Service (IRS) and the state of Texas and paying any income, estate or inheritance taxes that may be due from the estate.

Section 230 of the TPC states that the executor shall take care of the property of the estate of the testator as a prudent person would take care of his or her own property. If there are any buildings belonging to the estate, the executor shall keep them in good repair, extraordinary casualties excepted, unless directed not to do so by an order of the court.

Visual #19
Executor's Fees

Section 241 (a) of the TPC sets the executor's fees. Basically, the executor gets 5 percent of all sums received and disbursed in cash during the administration of the estate--cash on hand at the beginning of the administration and cash paid to devisees are excepted. A ceiling of 5 percent of the gross fair market value of the estate is placed on the fees except where the executor manages a farm, ranch, factory or other business of the estate or where the compensation so calculated is unreasonably low. In such cases, the court may allow reasonable compensation for the services.

If the executor is a family member, it may be better not to claim an executor's fee. Although the fee is a deduction for estate tax purposes (if the estate is that large), the fee is ordinary income to the recipient subject to social security taxes. The IRS taxes the receipt of the executor's fee to the appointed family member (whether actually received or not) unless a timely, formal waiver is filed with the IRS. (See revenue rulings 66-167 and 70-237.)

Texas law is quite liberal as to who can serve as executor. Section 78 of the TPC contains a list of persons who cannot serve. The list includes minors, incompetents, convicted felons, non-residents who have no appointed official agent to act on their behalf in Texas, corporations that are not authorized to act as fiduciaries in Texas and persons found unsuitable by the court.

If the executor appointed in the will refuses to serve or is disqualified and an alternate is not appointed in the will, Section 77 of the TPC contains a list of individuals, in the order of priority, who may be appointed by the court. The list is found in Section D of the appendix.

Past experience has led some experts in the field to suggest the following considerations be used in selecting an executor:

Visual #20
Attributes of Executor

* availability, permanence and continuity to render necessary services,

* financial responsibility for making sound business judgments,

* knowledge and expertise in administering the estate,

* impartiality in dealing with the testator's heirs,

* knowledge and expertise in managing the type of assets comprising the testator's estate (is the testator a farmer, restaurant owner-manager, etc.?)

* relationship of executor to the creditors of both the estate and the beneficiaries,

* ability and adaptability of executor to act quickly to preserve and manage the estate, if need be, even before the will is entered into probate, and

* honesty, loyalty and trustworthiness in general.

Thus, it is quite evident that the choice of the executor must be geared not only to the needs and demands of the estate but also to the personality, abilities and integrity of the executor. For this reason, some testators opt for co-executors--one an individual and the other a business entity such as a corporation. Thus, the varied needs of administering and managing the estate can be met.

Where multiple marriages have occurred, many commentators recommend that possible conflicts between the two families be avoided. For example, do not place the present spouse in a position of control over assets passing to or benefitting children of a previous marriage. Similarly, do not name a child by a previous marriage as executor where the subsequent spouse is a beneficiary.

Once a potential executor has been selected, the testator should contact the selected party (or parties) prior to finalizing the will. The candidate should be apprised of the duties and asked if he or she will or can serve. If the candidate accepts, the testator should send to him or her an executed copy of the will or instructions as to the location of the executed will.

When determining the appointment and duties of the executor, the testator also may want to consider the following:

Visual #21
Will Provisions
Regarding Executor

* appointment of an alternate executor in the event the first one predeceases the testator or cannot serve for whatever reason (the appointment of co-executors is another possibility),

* decide whether the executor must post bond in order to serve? Sections 149, 189 and 195 of the TPC provide that the executor must post bond to qualify

unless the will states otherwise. Where required, the amount of the bond is fixed by the judge in an amount sufficient to protect the estate and its creditors. The procedure for determining the precise amount of the bond is contained in Section 194 of the TPC. Section 195(b) of the TPC state that a corporate executor is exempt from bonding,

* describe the powers the executor is to have in dealing with the estate and

* provide, where feasible, for independent administration of the estate by appointing an independent executor.

Independent Administration

Section 145(b) of the TPC provides that anyone capable of making a will may provide that no action shall be had in court as to the settlement of the estate other than the probating and recording of the will, and returning an inventory, its appraisal and list of claims of the estate. By inserting such a provision in the will, the testator qualifies the estate for independent administration. Furthermore, the testator may reinforce the independent administration by stating the executor is to serve as an independent executor.

Visual #22
Independent
Administration

By taking advantage of independent administration, the testator generally frees the executor from court supervision in administering the estate. After probating (or proving) the will and returning the required inventory of the estate and list of claims, the executor rarely is required to report or to obtain any authority from the probate court in administering and settling the estate.

However, independent administration does not sever the independent executor from all court supervision. The independent executor still must file

periodic accounting reports with the court according to Sections 149A and 149B of the TPC.

Likewise, the law still provides adequate safeguards for the protection both of the beneficiaries and the creditors of the estate when independent administration occurs. For instance, Section 149 of the TPC provides that the independent executor must post bond (when not required to do so in the will) for the following reasons:

* where it appears the executor is mismanaging the property,

* where the executor has or is about to betray his or her trust, or

* where the executor has in some way become disqualified.

Furthermore, Section 149C of the TPC provides five reasons for removing an independent executor. The reasons include failure to return a timely inventory and list of claims, misapplication of funds or embezzlement, failure to file accounting reports, gross misconduct or gross mismanagement, incompetence or incapacity to serve.

If the testator fails to qualify the estate for independent administration in the will, Section 145 of the TPC contains provisions whereby the distributees of the will can still allow for independent administration. However, Section 145(o) states that if the testator provides in the will that there can be no independent administration, the request must be honored.

For all practical purposes, the independent executor stands in the shoes of the decedent whose estate is being administered. To remove all doubts as to the powers of the independent executor, it is common practice for the testator to state in the will that in

addition to the powers conferred by law, the independent executor shall have the powers of a trustee.

From a planning point of view, the will can authorize the sale or lease of property by the independent executor without court approval. Without such stated authority, both the sale of real estate and personal property are authorized by the TPC for limited purposes only.

Visual #23
Optional Powers to Grant Independent Executor

Also, the will can authorize the independent executor to enter oil and gas leases and possibly coal and lignite leases. The language can stipulate not only the power to lease but the power to execute related documents such as operating agreements, unitization agreements, assignments, releases and other similar instruments. The duration of such instruments can be extended beyond those permitted by statute, which is generally five years. Otherwise the independent executor must comply with Sections 367 to 372 of the TPC as to the terms and conditions of the instruments that can be entered although the procedural requirements are not incumbent on the independent executor.

Because independent administration of an estate generally facilitates the least expensive, most effective and quickest way to settle an estate, the testator should consider the alternative seriously. Because of the trust placed in the independent executor, the testator should choose such an executor carefully and may require the executor to post bond.

Simultaneous Death Provisions

In many instances, the law will not give literal effect to the terms of a testator's will. In some circumstances, to do so would do a grave injustice to the testator. One example involves occasions where the testator and a beneficiary die in a common disaster.

For example, suppose a husband executes a will making his spouse the primary beneficiary. During an automobile trip, the testator is killed and the wife is seriously injured. She dies three days later. To give literal effect to the terms of the will would mean the husband's estate passes to the wife and three days later passes to a third party.

The injustice could arise in several ways. For one, suppose neither the husband nor the wife's estate taken alone would incur any death taxes. However, the two combined estates would incur a large tax burden. By stacking (or combining) the two estates during the three-day period, the two estates would be drastically reduced by taxes.

Visual #24
Simultaneous Death Provisions

Another injustice could occur where the wife owns no property of her own. If she were to predecease the husband, there would be no need to probate her estate. However, by receiving the property from her husband, the husband's estate would bear the costs and expense of two probates.

And lastly, an estate could suffer delays and litigation costs if there were some doubt as to which spouse died first. For instance, suppose both the husband and wife had previous marriages. Both spouses have children by their prior marriages. If the wife predeceases the husband, her family would get nothing from the husband's estate. However, if the husband dies first, the wife's heirs would get all the husband's estate.

To help alleviate the problem, Section 47 of the TPC provides that if a devisee does not survive the testator by 120 hours (five days), the devisee is treated as if he or she predeceased the testator unless the will states differently. This leaves the option with the testator. The testator may vary the time periods that each or all

devisees must survive the testator in order to take under the will. The longest period ranges around six months; the average period is approximately 60 days.

Providing for the Care of Minors and Incompetents

In instances where both spouses die in a common disaster or where there is only one surviving spouse, the will should have some provisions regarding the care of minors or incompetents under the testator's care.

There are at least two viable alternatives. One involves the appointment of a guardian in the will; the other is establishing a testamentary trust.

If the first alternative is chosen, the selection of a guardian is as important selecting an executor. The psychological needs and personality of the individual to be cared for are best served when matched with that of the guardian. Likewise, the impartiality, integrity, business judgment, disciplinary abilities and many other traits of the potential guardian are among the other considerations. The potential guardian should be contacted and get prior consent before the will is finalized.

Visual #25
Selecting a Guardian

Guardians appointed in a will serve under the strict scrutiny of the court. They are required to take an oath of office, to post bond, to manage the estate in the manner of a prudent person and to file periodic and a final accounting report with the court.

Texas law provides for the appointment of two types of guardians--one for a person, another for an estate. One person may serve in the dual capacity at the same time. One of the main differences is that the guardian of a person is entitled to no compensation under Texas law while the guardian of the estate is.

The law prefers a close relative to serve as a guardian of minors when one is not appointed in the will . Even if a guardian is appointed in the will, the law still contains strict guidelines for the qualification of the guardian and grounds for removal.

The minor (or ward) may choose the guardian with the court's approval if the minor is at least 14 years of age. The minor even may choose another guardian after reaching 14 if the present one dies, resigns or is removed.

Visual #26
Establishing a
Testamentary Trust

An alternative to the guardian is the implementation of a testamentary trust in the will. A testamentary trust is one that takes effect at the death of the testator. The terms of the trust, the trust property and the trustee are described in the will.

The trustee could, and possibly should, be the same individual who would serve as the guardian. The main differences are that the trustee is free of the jurisdiction of the court, the administration of the assets are not public record and the trustee receives a fee.

Examine the advantages and disadvantages of the two alternatives closely. The method best fitting the needs of both the testator and the person to be cared for should be selected.

Self-Proving Affidavit

After a will has been admitted to court, it must be proven by the sworn testimony or affidavit taken in court of one or more of the subscribing witnesses. If the will is a holographic will, it must be proven by two witnesses who recognize both the testator's handwriting and signature and evidence it by sworn testimony or affidavit, again, taken in open court. If the witnesses are non-residents of the

county, or if the witnesses are residents and cannot attend, then alternate measures of proof can be pursued.

Many problems may arise using this method of proof. The witnesses may predecease the testator, become incompetent or they may be difficult or impossible to locate. To alleviate the problem, Section 59 of the TPC provides an alternative solution. By attaching an affidavit to the will, either at the time of execution or at a later date, wherein the testator and the two witnesses subscribe their names before a notary, the will becomes self-proven. The recommended form and the contents of the affidavit are contained in Section 59 of the TPC and reproduced in Section E of the appendix.

Visual #27
Self-Proving Affidavit

The self-proving affidavit has the effect of substituting for the testimony of the witnesses before the court. Thus, the self-proven will can be admitted to probate without the testimony of any subscribing witness. However, the affidavit does not prevent the self-proven will from being contested, revoked or amended by a codicil in exactly the same manner as any other will.

The affidavit cannot make an otherwise invalid will valid. A will was rightfully denied probate in the case of Douthit v. McLeroy, 539 SW2d 351, where the witnesses had signed the self-proving affidavit but not the will itself.

Codicils can and should be made self-proven in the same manner as a will. Otherwise, a self-proven will could be admitted into probate without the testimony of witnesses, while a non-self-proven codicil would require independent proof.

Holographic wills may be made self-proven at any time during the testator's

life with a similar affidavit, except the two subscribing witnesses are not required. Section 60 of the TPC contains the procedure.

Visual #28
Additional Information

Note: The Real Estate Center's booklet, Texas Wills also contains the following sections:

Revoking, Changing, Destroying and Cancelling A Will

Grounds For Contesting A Will

Miscellaneous Considerations When Preparing A Will

Will Substitutes

Summary

Appendix

Glossary of Terms

For additional copies, request Real Estate Center publication 449, Texas Wills. Copies are $5 each

Small, Non-Taxable Estates

- Value of non-taxable estates
  -- less than $325,000 in 1984
  -- less than $400,000 in 1985
  -- less than $500,000 in 1986
  -- less than $600,000 in 1987

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Visual No. 1

What Is a Will?

- Written or oral

Description of property distribution

After death

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Visual No. 2

Testator and Beneficiaries

- Testator
  -- disposes of property through a will
- Devisee
  -- receives land, real property by will
- Legatee
  -- receives personal property by will
- "Devise" by will
  -- includes transfers of both personal, real property

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Visual No. 3

Testator's Qualifications

- Testator must be:
  -- of sound mind and
  -- at least 18 years of age or
  in a branch of the armed forces or
  legally married

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Visual No. 4

Types Of Wills

- Formally drafted and executed
  -- typewritten
  -- signed by maker and two witnesses

- Holographic
  -- entirely handwritten
  -- signed by maker

- Nuncupative
  -- oral declaration
  -- made during last illness

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Visual No. 5

Provisions

- Preamble
  Opening paragraph recites:
  -- testator's name
  -- qualifications
  -- county of residence

- Revocation of prior will and codicils
  Opening paragraph should
  state explicitly it
  revokes all prior wills
  and codicils

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Visual No. 6

Payment Of Debts

- Debt-retirement clause describes how debts, expenses handled:

-- specify whether long-term debts to be paid by estate

-- specify which assets to pass debt free and those used to satisfy debts

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Visual No. 7

Order Assets Taken To Satisfy Debts (When Not Otherwise Stated In Will)

- Assets passing under residual clause taken first
- Assets passing under general devise taken next
- Assets passing under specific devise taken last

Note: Personal property is taken before real property in each category

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Visual No. 8

Types Of Devises

- Residuary devise
  -- disposes of property not otherwise devised in will

- General devise
  -- disposes of property of a general nature - i.e., "all my real property"

- Specific devise
  -- disposes of particular assets
  -- subject to ademption

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Visual No. 9

Ademption

- Indirect (or implicit) withdrawal or cancellation of a specific devise
- Occurs when specifically devised assets missing from testator's estate at death

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Visual No. 10

Abatement

- Process of determining distribution among beneficiaries when assets insufficient to pay debts and satisfy all bequests

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Visual No. 11

Guidelines To Consider When Disposing Of Assets

- Use mandatory words "give", "bequeath", "devise"
- State both full name and kinship of close relatives
- Dispose of all assets at least to first or second alternative
- Fulfill promises of specific bequests
- Place residuary clause in the will

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Visual No. 12

Per Stirpes Vs. Per Capita Distribution

- Per stirpes
  -- persons of specified group or degree of kinship share equally
  -- descendents share equally in portion that would have gone to predecessor

- Per capita
  -- all members in class share equally regardless of degree of kinship

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Visual No. 13

Limited Forced Heirship Statute Section 67(a) TPC

- Under specified conditions, children born or adopted after will's execution can force intestate's share from estate

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Visual No. 14

Limited Forced Heirship Statute Section 67(b) TPC

- If certain specified conditions transpire, will placed in suspense for one year following testator's death

- If after-born or adopted children die during this period, will is valid. Otherwise will voided and estate passes by descent and distribution

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Visual No. 15

Alternatives To Statutes 67(a) And (b) TPC

- Revise will or execute a codicil after birth or adoption of each child
- Insert special provision for this contingency
- Direct executor to make settlements for children born or adopted after will's execution

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Visual No. 16

Executor

- Man appointed to carry out the will's directions and dispose of testator's property accordingly

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Visual No. 17

Executor's Duties

- General

-- collect and preserve estate's assets

-- pay debts and distribute residue

-- probate will and settle estate

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Visual No. 18

Executor's Fees

- Executor gets 5% of all sums received and disbursed during administration
- Ceiling of 5% of gross fair market value of estate
- Court may allow additional compensation if 5% too low

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Visual No. 19

Attributes Of Executor

- Availability, permanence, continuity
- Financial responsibility
- Knowledge and expertise in management and administration
- Impartiality
- Adaptability
- Honesty, loyalty, trustworthiness

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Visual No. 20

Will Provisions Regarding Executor

- Appoint an alternate
- Waive bonding requirement
- Describe executor's powers
- Provide for independent administration

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Visual No. 21

Independent Administration

- Essentially frees executor from the court's supervision by providing that: no action be taken by court other than probating and recording will and returning an inventory, appraisal and list of claims of estate

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Visual No. 22

Optional Powers To Grant Independent Executor

- Will can authorize
  -- all powers a trustee has under Texas Trust Act
  -- the sale or lease of assets by an independent executor
  -- entering oil and gas leases and possibly coal and lignite leases

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Visual No. 23

Simultaneous Death Provisions

- Injustices avoided:

-- combined estates incur a larger tax burden

-- if wife owns no property, husband's estate may bear cost and expense of two probates

-- estate could suffer delays and litigation costs if there was doubt as to which spouse died first

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Visual No. 24

Selecting A Guardian

- Attributes include:

  -- impartiality

  -- integrity

  -- business judgment

  -- disciplinary abilities

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Visual No. 25

Establishing Testamentary Trust

- Takes effect at testator's death
- Trust terms, property and trustee described in will
- Trustee free of court's jurisdiction
- Asset administration is not public record
- Trustee receives a fee

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Visual No. 26

Self-Proving Affidavit

- Testator and two witnesses subscribe their names before notary on attached affidavit.

  The will becomes self-proven

  - Effectively "proves" will for probate without testimony of witnesses

    - Does not prevent will from being contested, revoked or amended

- Affidavit cannot make an invalid will valid

  - Codicils should also be self-proving

  - Holographic wills can be self-proven

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Visual No. 27

Additional Information

- Texas Wills, publication 449, Cost $5

Also contains:

-- revoking, changing, destroying and cancelling a will

-- grounds for contesting a will

-- miscellaneous considerations when preparing a will

-- will substitutes

-- summary

-- appendix

-- glossary of terms

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